No. 12884

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE CO., and WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAYMOND M. CRANE, RED LION PACKING COMPANY and JOHN C. KAZANJIAN,

Appellees.

Brief of Appellee Raymond M. Crane, Doing Business as Associated Fruit Distributors of California.

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In this proceeding complainants sought to recover damages from respondents for failure to deliver ten cars of grapes in accordance with an alleged contract. For brevity, respondent Raymond M. Crane, doing business as Associated Fruit Distributors of California, will be hereafter referred to as "Crane" and respondent John C. Kazanjian, doing business as Red Lion Packing Company, will be referred to as "Kazanjian."

Complainants contended and alleged that "respondents, by contract in writing * * * contracted to sell to complainants ten carloads of government inspected U. S. No. 1 emperor grapes * * *" [Tr. pp. 17, 18]; "that the complainants were also to pay $50.00 per car buying

service for the respondent, Associated Fruit Distributors of California * * *" [Tr. p. 18]; that one Jay Margules, doing business as Southwest Brokerage Company, acted "as agent for both complainants and respondents and that the respondent, Associated Fruit Distributors of California, was acting for and on behalf of itself and as agent for and on behalf of the respondent, Red Lion Packing Company." [Tr. p. 19, par. 5.]

Respondent Kazanjian denied that Jay Margules, doing business as Southwest Brokerage Company, acted as an agent in any manner for him in negotiating any purchase or contract and denied that Associated Fruit Distributors of California was acting on behalf of, or as agent for, Red Lion Packing Company in any negotiations whatsoever. [Tr. p. 34, par. 2.]

Respondent Crane answered complainants' complaint denying paragraph 4 thereof wherein it was alleged that said respondent contracted to sell said grapes and said respondent affirmatively alleged that it contracted to procure for complainants' account, rather than to sell to complainants, the grapes in question and that said respondent was to receive compensation of $50.00 per car from complainants and that respondent was acting as agent for complainants, and denied that respondent was acting for itself and as agent for Red Lion Packing Company, but on the contrary alleged that it was acting for the complainants. [Tr. pp. 38, 39, pars. 4, 5.]

On the pleadings above outlined this proceeding went to hearing before the Secretary of Agriculture and an order was made against the respondent Kazanjian and dismissing the proceeding as to respondent Crane. [Tr. p. 63.]

Respondent Kazanjian appealed to the District Court at Los Angeles and prior to the trial respondent Crane filed an amended answer [Tr. pp. 64-68] realleging that he was not acting as principal or seller or as agent for the principal or seller, but as procuring broker or buying agent for the complainants [Tr. p. 65], that he submitted complainants' offer to Kazanjian and he accepted said offer and ratified same [Tr. pp. 65, 66]; that the terms of the alleged transaction were never definitely agreed upon [Tr. p. 66]; that the alleged contract was in violation of the Statute of Frauds [Tr. pp. 66, 67] and that the contract contended for by complainant was in violation of the Emergency Price Control Act of 1942 and therefore void, which said latter defense was presented upon the assumption that respondent Crane was acting as a principal or as agent for Kazanjian and upon the further assumption that said alleged contract was entered into by respondent Crane as principal, or by respondent Kazanjian as principal. [Tr. pp. 67a, 68.]

At the trial of this action before the Department and before the District Court, Crane contended (1) that he was a procuring broker or buying agent for the complainants, and (2) that as agent for the complainants he was not liable for default on the part of Kazanjian to deliver.

On a trial *de novo* before the District Court the proceeding was dismissed as to both respondents.

In complainants' attack upon the decision of the District Court they contend that the evidence does not sustain the findings of the Court. The first assignment of error in this regard deals with the question of the status of Crane as a broker. This contention of error will be first considered by us.

Answer to Contention That the District Court Erred in Holding That Crane Was Solely the Agent of Appellants.

The District Court made detailed findings of fact covering the transaction between the parties and found that respondent Kazanjian refused to employ respondent Crane to act as his broker or agent in the sale of grapes for the 1944 grape season, for the reason that there was a ceiling price on grapes and a very active market so that Kazanjian did not need a broker or agent to secure customers for his grapes. [Tr. pp. 71-73, par. III.]

The Court further found that "In the transactions involving the proposed sale of ten carloads of grapes by respondent * * * Kazanjian to" complainants "the respondent Crane * * * acted as buying broker and agent for said complainants." [Tr. p. 78, par. VII.]

It will be remembered complainants alleged in their complaint that Crane was acting for himself and as agent for Kazanjian. [Tr. p. 19, par. V.]

Nowhere in the pleadings did complainants allege Crane was acting as their agent or as agent for both parties.

We submit that the findings of fact on the question of agency are supported by substantial evidence.

The Complainants' Own Testimony Shows That Crane Was Their Agent.

There was received in evidence on the offer of complainants the testimony taken at the hearing before the Department of Agriculture. [Tr. p. 130, Compts. Ex. 5.]

A part of this evidence was the testimony of Joe Mosesman, one of the partners of Central Fruit and

Vegetable Company. [Tr. pp. 367, also pp. 16, 17, par. 1.] Mr. Mosesman testified that he was connected with the Central Fruit and Vegetable Company [Tr. p. 367], that he handled the transaction in question on behalf of Central Fruit and the West Texas Produce Company and first contacted the Southwest Brokerage Company—that is, Jay Margules. [Tr. p. 368.]

On cross-examination by Mr. Wackerbarth [Tr. p. 383] Mr. Mosesman testified: That he agreed with Mr. Margules to pay Crane his $50.00 procurement charge; that he was willing to pay Crane a $50.00 fee for getting these cars for him; that he knew Crane was going to try to get these various cars for him, and he knew that he was going to pay Crane $50.00 a car for getting these cars for him; that Mr. Margules told him that and he was agreeable to paying that [Tr. p. 392]; that he knew Crane was trying to get some grapes for him and on the morning of October 3rd he knew that Crane was trying to get ten cars of Emperor grapes for him from Red Lion Packing Company and it was satisfactory to him for Crane to try and get the grapes for him. [Tr. pp. 395-6.]

On cross-examination by Mr. Aynesworth [Tr. p. 408] Mr. Mosesman testified as follows:

> "Q. In view of the fact that this agreement here, which is attached as a part of the pleading as Exhibit 2 on the complaint—I notice that that is made with Associated Fruit Distributors, and so forth—it was your understanding, was it not, that you were to send that money, the initial deposit, and so forth, to the Associated Fruit Distributors? A. Yes, sir.
>
> Q. And then depend upon them to transmit it—if the Red Lion were the people supplying you with

the grapes, that they would transmit it in turn to the Red Lion Packing Company? A. Yes, sir.

Q. You of course regarded Mr. Crane, that is, the Associated Fruit Distributors, as acting for you and as your employee in procuring this fruit for you, didn't you? A. Well, yes.

Q. And he and the Southwest Brokerage Company were both acting for you in trying to procure grapes, were they not? A. That's right. [Tr. p. 410.]

On cross-examination by Mr. Wackerbarth, Mr. Mosesman further testified as follows:

"Q. Mr. Aynesworth asked you as to whether or not you regarded Crane as acting for you, and you said that you did. That was your statement, wasn't it? A. Yes, sir.

Q. And that was correct, wasn't it? Your statement was correct, wasn't it? A. Yes, sir. [Tr. p. 413.]

On re-cross examination by Mr. Wackerbarth, Mr. Mosesman testified that he was going to pay Associated $50.00 a car "to secure the grapes, I suppose" and it didn't make any difference to him from whom they would get the grapes as long as they got the grapes they could get them from anybody they could get them from, and on that deal he was to pay Associated $50.00 for their services in getting these grapes. [Tr. p. 418.]

On re-cross examination by Mr. Aynesworth Mr. Mosesman testified that at the time he was called in to approve this contract he knew that Associated expected him to pay them for their services in procuring these grapes and at the time when he was paying them $50.00

he thought they were rendering a service for him in procuring the grapes. He further testified as follows:

> "Q. And you in that way considered them your agents in procuring grapes for you, didn't you? A. Yes, sir. [Tr. p. 419.]

Harry Bockstein, a partner in West Texas Produce Company [Tr. p. 17] testified on cross-examination by Mr. Wackerbarth, as follows [Tr. p. 148]:

> "I understood I was to pay Associated $50.00 a car and my understanding as to why we were paying it is that it was a buying brokerage; it wasn't definitely specified to me whether he was procuring it or if he was acting for the shipper; the only thing I knew I had to pay $50.00 a car to Crane as a procurement charge; I found that out before October 3rd when I gave Southwest Brokerage instructions to buy; on October 2nd I knew Red Lion owned the grapes; I didn't know whether Mr. Crane had to contact Red Lion in connection with this sale. [Tr. pp. 148, 149, 150.]

Clearly the complainants' own testimony showed that Crane was their agent.

Respondents' Evidence Showed That Crane Was the Agent of Complainants.

Raymond M. Crane, called on behalf of respondents, testified on direct examination by Mr. Wackerbarth, as follows [Tr. p. 189]:

> "Q. (By Mr. Wackerbarth): Now, Mr. Crane, among the produce trade is there such a relationship that is known as buying broker? A. Yes, sir.
>
> Q. What are the duties of a buying broker among the produce trade? A. The duties of a buying bro-

ker is to contact shippers and procure and secure merchandise for buyers.

Q. Under those cercumstances who pays the buying broker? A. The buyer.

Q. And is there any established practice of custom among the produce trade as to whose agent a buying broker is? Just answer that yes or no. A. Yes.

Q. What is that practice or custom? A. In those respects he is the agent of the buyer.

Q. And in this particular instance were you acting as the agent of the buyer? A. Yes, sir. [Tr. pp. 203-204.]

Raymond M. Crane testified by deposition, introduced in evidence, as follows [Tr. p. 300]: On September 26, 1944, and October 2, 1944, we were soliciting business from brokers as their procurement agent or broker, which is our normal business. In charging $50.00 as a procurement charge it was our intention that the fee was to be paid to us as agent of the buyers in connection with procuring these grapes. [Tr. p. 303.] At that particular time it was a matter of common practice and custom for us to solicit other brokers to use our services as a procurement agent and pay for same. [Tr. p. 306.] It was a very common practice for the broker to act for the buyer and pay a brokerage procurement charge. That is the only way the broker could exist because ceilings were set and the buyer was entitled to hire anyone he wanted to buy for him if he wanted the merchandise. [Tr. p. 307.]

Respondents' Evidence Showed That Crane Was Not the Agent of Kazanjian.

John C. Kazanjian, one of the respondents, testified as follows [Tr. p. 170]: I never had any idea that Crane had sent out the telegram of September 26, 1944. [Tr. p. 181.] Crane never told me who he was doing business with. [Tr. pp. 184-185.] I did not have any control or direction over what Crane did, or acted or negotiated—absolutely not, and in this particular deal there was no agreement on my part to pay any commission whatsoever to Crane. [Tr. pp. 359-360.]

Respondent Raymond M. Crane testified as follows [Tr. p. 221]: I did not have any agreement of any character with Kazanjian for the payment to me of a commission in connection with the sale during 1944 when the ceiling was on. [Tr. p. 239.]

The foregoing quoted evidence, particularly the evidence of the complainant Joe Mosesman and the complainant Harry Bockstein, shows without doubt that Crane was acting as the agent of the complainants, and the evidence of Crane and Kazanjian shows that Crane was not acting as the agent of Kazanjian.

A Broker Is the Agent of the Person Who Pays His Compensation.

"Buying broker" and "procuring agent" are terms used in the produce business.

The Produce Reporter Blue Book, which is a publication followed by the produce industry, contains the following:

> "'Buying Brokers' are special agents with authority to purchase—limited to direct instructions

from their principals, and to those incidental powers which are reasonable and necessary for the accomplishment of the object of the agency."

In a case decided by the Secretary of Agriculture and reported in 6 A. D. 928 (Agricultural Decisions) a question was presented as to whom a broker represented. The seller contended that the broker was the agent of the buyer, and the buyer contended that the broker was the agent of the seller. The Secretary held that the broker was the agent of the seller as the seller had agreed to pay the agent's brokerage.

In the case of *Adams etc. v. Martinelli etc.,* 6 A. D. 1018, a question was presented as to whom the broker represented in the transaction. The Secretary held the broker to be the buying agent for the purchaser.

In the case of *Russum v. Schowker etc.,* 6 A. D. 583, a seller of produce filed a proceeding against the purchaser and broker. The broker contended that the purchasers authorized him to order the car of tomatoes for them. In passing on the question of agency, the Secretary referred to the case of *Western etc. v. Krasnow,* P. A. C. A. Docket No. 2312 S-1677, where the following statement is found:

> "It has been held repeatedly that where an offer is made by a buyer to a broker who transmits it to the seller, the buyer thereby makes the broker his agent, at least for the purpose of transmitting such offer to the seller and receiving either an acceptance or rejection thereof."

The Secretary held the respondent Turner to be the broker for the purchaser, and dismissed the proceeding as to the broker.

In 5 A. D. 646 the Secretary stated, "The evidence indicates that the broker's services were paid by the respondent partnership. It is clear that the broker was the agent of the respondent."

In the case of *Barker etc. v. Berman,* 8 Fed. Supp. 60, an action was brought in the United States District Court to enforce a liability determined by the Secretary of Agriculture. With reference to the status of the plaintiff in this proceeding the Court stated as follows:

> "Plaintiff was not attempting to sell to the defendant goods which it had acquired for its own purposes. Plaintiff went into the market and made purchases for defendant. Plaintiff was defendant's purchasing agent or broker and was paid a fee for his services in purchasing for the defendant. There was no relationship of buyer and seller despite the fact that the plaintiff advanced the purchase money at the time of obtaining the merchandise."

Under the foregoing authorities the payment by the complainants to Crane of a fee for his services is the determining factor as to whom Crane represented.

The Findings of the District Court Being Supported by Substantial Evidence the Reviewing Court Will Not Consider Conflicting Evidence.

We have heretofore quoted from or summarized the evidence of Mosesman and Bockstein, two of the complainants, also the evidence of the respondents Crane and Kazanjian. All this evidence sustains the findings of the District Court.

The findings of the District Court being sustained by substantial evidence, and we submit they are sustained by the preponderance of evidence, then the reviewing

court will not go into the question of the weight of the evidence or consider conflicting evidence. The rule in this regard is set forth in 3 Am. Jur., page 464, Section 900, as follows:

> "When dealing with findings of fact made by the trial court, the question for the appellate court is whether there was any evidence to sustain the conclusion reached by the court below. A finding of fact by the court below cannot be rejected on appeal where there was sufficient evidence to sustain it, where it is not contrary to the preponderance of the evidence, where it cannot be said that there was no warrant for the findings, or where there is room for reasonable minds to differ as to the facts. As the rule is laid down by many courts, findings of the trial court which are supported or sustained by competent evidence are binding upon the appellate court and cannot or will not be interfered with or disturbed by that court, even though the evidence is conflicting."

In the case of *Bereth v. Sparks* (C. C. A., 7th Cir.), 51 F. 2d 441, 80 A. L. R. 909, appellant sought to have the Circuit Court review the evidence and set aside certain of the findings of the Trial Court. In refusing to do so the Circuit Court stated as follows:

> "There was at least substantial evidence adduced and facts found to warrant the court in concluding that appellant was a joint tort-feasor, and with this conclusion we are not at liberty to interfere, if we were so inclined."

The same rule is supported by the following cases:

Springfield Fire & Marine Insurance Co. v. National Fire Insurance Co. (C. C. A., 8th Cir.), 51 F. 2d 714, 76 A. L. R. 1287;

DeLaval Steam Turbine Co. v. United States, 284 U. S. 61, 76 L. Ed. 168;

Cate v. Certain-Teed Products Corporation, 23 Cal. 2d 444-8, 144 P. 2d 335.

Complainants Did Not Establish That Crane Was Agent for Kazanjian.

On page 24 of appellants' opening brief they state, "The Secretary's finding however, that Crane was a broker acting as agent for both buyer and seller was *prima facie* evidence of such fact, and presumptive thereof until overcome (as distinguished from merely contradicted by) other evidence."

This contention is predicated upon the provisions of the Perishable Agricultural Commodities Act (Sec. 7, subsec. c) which provides that "* * * the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts therein stated."

The preliminary statement, findings of fact, conclusions and order of the Secretary of Agriculture are set forth in the transcript [pp. 41-63]. The Secretary's findings of fact are set forth on pages 49 to 52 and there is no finding that Crane was acting as agent for both buyer and seller.

Under the conclusions the Secretary states: "In this proceeding much discussion was devoted to the question whether Associated was the agent of Red Lion or of complainants." [Tr. p. 52.] The Secretary thereupon points out certain facts developed by the evidence, and presents several statements of law with reference to the question as to whose agent the broker may be, but the Secretary does not make any conclusion holding that

Crane was the agent of both parties. The Secretary then states under his conclusions: "The most important and perhaps the only real issue here is whether a contract was made which is enforceable under the California Statute of Frauds." [Tr. p. 54.]

From the foregoing it will be seen that no *prima facie* case was established by complainants to the effect that Crane was the agent of Kazanjian or the agent of both parties.

Assuming, however, that there is such a finding then we submit that this finding was overcome by a preponderance of evidence. The rule with reference to meeting or overcoming *prima facie* evidence of facts is set forth in 20 Am. Jur. page 1102, Section 1251, as follows:

> "When the party having the burden of proof establishes a *prima facie* case, he will prevail, in the absence of proof to the contrary offered on the part of his opponent. If the latter would avoid the effect of such *prima facie* case, he must produce evidence to meet it. It is not necessary that this *prima facie* case be met by a preponderance of the evidence or by evidence of greater weight. It is sufficient if the defendant's evidence equalizes the weight of the plaintiff's evidence, or, in other words, puts the case in equipoise. The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue and remains upon him throughout the trial. If upon all the facts the case is left in equipoise, that party must fail."

In the case of *Threlkeld v. Ballard,* 296 Ky. 344, 177 S. W. 2d 157, 151 A. L. R. 708, the Court considered the

question of the effect of the *prima facie* case, and stated the rule as follows:

> "It is the settled rule of law that once a party establishes a *prima facie* case, judgment will go in his favor unless the opposite party produces evidence sufficient to overcome the *prima facie* presumption."

In the case of *First National Bank v. Ford* (Wyo.), 216 Pac. 691, 31 A. L. R. 1441-6, the Court considered the question of the burden of proof and the effect of establishing of a *prima facie* case, and stated the rule as follows:

> "He who has the burden of proof, properly speaking, has imposed on him the obligation to establish the existence of the facts alleged by evidence at least sufficient to destroy the equilibrium and overbalance any weight of evidence produced by the other party. (Citing cases.) On the other hand, the burden of evidence, or to go forward with it, means simply the meeting of a *prima facie* case made, rather than producing a preponderance of the evidence, or evidence of greater weight."

See also *Cody v. Market Street Railway Co.*, 148 Cal. 90; 82 P. 667.

Conclusion.

In conclusion, we submit that the evidence both of the complainants and the respondents shows clearly that Crane was acting as a buying broker and that he was the agent of the buyers; that the findings of the District Court are supported by substantial evidence and assuming, without conceding, that the Secretary's finding established the fact of Crane being the agent for the buyer as well as the seller, such *prima facie* evidence was overcome by competent, substantial evidence presented on behalf of the respondents.

Answer to Contention That the Undisputed Evidence Established the Existence of a Binding Contract Between the Parties Hereto.

Under Point II of appellant's opening brief appellant sets forth the elements of a contract and certain conclusions drawn by the Trial Court, and then points out that succeeding paragraphs fully demonstrate that the findings and conclusions are unsupported by credible evidence and are erroneous. This contention will be answered under the answer to the succeeding contention.

Answer to Contention That a Standard Confirmation of Sale Was Not Necessary.

Under Points III (page 28), IV (page 35), V (page 36), VI (page 39) and VII (page 40), of appellants' opening brief appellants attack the findings of the Trial Court to the effect that a standard confirmation of sale was contemplated by the parties.

We feel that the District Court was justified in its conclusions of law to the effect "That the telegrams sent by Crane to Margules required that any contract entered into should be confirmed in writing by the parties to the proposed contract and in particular John C. Kazanjian at Exeter, California." [Tr. pp. 81-82.]

The District Court found that prior to September 26, 1944 Crane discussed with Kazanjian the matter of the sale of grapes during the 1944 season; that Kazanjian refused to employ Crane as his broker or agent for the

reason that there was a ceiling price on grapes established under the Federal Emergency Price Control Act, and that the market for grapes at that time was very active, and that Kazanjian did not need a broker or agent to secure customers for the purchase at the ceiling price of the grapes produced and packed by him, and that Kazanjian was willing to sell grapes in car lots but that each sale would be a separate transaction and handled upon terms to be agreed upon at the time of making such sale. [Finding III, Tr. p. 72.]

After discussing the matter of the sale of grapes for the 1944 season Crane being unable to act as the seller's agent or broker sought to develop business by acting as the buying broker or agent for the purchasers, and he thereupon sent out the telegram of Sept. 26, 1944 to thirteen different brokers throughout the United States. This telegram set forth the terms under which Crane could book orders for grapes. This telegram clearly provides that any order would have to be confirmed by both the buyer and the seller. After setting forth certain terms the telegram provides as follows: "$500 part payment with confirmation" and "ADLAM," which means the grapes were offered subject to confirmation. The terms of this telegram were modified by the October 2nd telegram only in the number of cars and the price. 18 cars were reduced to 15 cars, and the price was reduced from $2.53 to $2.50 a lug. Otherwise, the telegram of September 26th stands.

The use of the words "$500 part payment with confirmation" clearly requires the buyer to send a confirmation to Crane for the signature of the seller, and that this confirmation was to be accompanied by $500 part payment. The use of the code word ADLAM showed that the offer was made subject to confirmation, which clearly signified a confirmation by the seller. Crane was not the agent of the seller but was seeking employment by buyers as a buyer's agent and as he was sending out these telegrams in an effort to procure buyers, it was necessary that any sale be confirmed by the seller.

It will be remembered that this telegram was sent by Crane to 13 different brokers offering to book 18 cars of grapes. 18 cars were all that Crane mentioned. Assuming that this was an offer to sell, then if each of the 13 brokers had wired Crane accepting the offer Crane would have had orders for 13 times 18 or 234 cars, which would be 216 cars more than Crane had located. This fact clearly demonstrates the wisdom of inserting in the telegram the requirement of the confirmation by the buyer accompanied by his check for $500 and also confirmation by the seller.

In a teletype message between Crane and Margules on October 2, 1944, "$500 part payment with confirmation" was changed and the obligation of the buyer was to pay $1000 deposit against each U. S. One inspection as the cars are loaded. [Tr. p. 475.]

The telegrams and teletype conversations do not disclose any change whatsoever in the requirement that the offer was to be confirmed by the seller. There was competent evidence before the Trial Court to show that under a booking arrangement of this character for future delivery of grapes a written confirmation signed by both parties was contemplated.

Respondent Crane produced in Court a printed standard memorandum of sale which was used by the produce trade in 1944 throughout the United States, and the same was received in evidence as Exhibit L. Crane also produced in evidence a printed form of standard confirmation of sale which was received in evidence as Exhibit M. [Tr. p. 237-8.]

Crane testified that when he sent the telegram of Sept. 26th and Oct. 2nd, and used the words "subject to confirmation" he was referring to a confirmation by the use of the standard confirmation of sale as used by the trade; that he had used that form for years on all preseason deals where it required a contract in writing; that it was the custom in the produce trade in 1944 to use the standard confirmation of sale and standard memorandum of sale; that he had never received a standard confirmation of sale signed by the complainants or Red Lion. [Tr. pp. 234-8.]

In Crane's telegram of October 3d to Kazanjian he stated: "Will forward forms for your signature soons receive air mail from buyers." [Tr. p. 453.] Crane fur-

ther testified that in sending the telegram of September 26th the grapes were offered subject to confirmation. This was done by the use of the word ADLAM, and in this particular instance this would mean that the sale would have to be confirmed by the seller. [Tr. pp. 195-7.]

Crane further testified that Kazanjian did not agree to his offers to brokers because the offers were made subject to confirmation; in other words you would not make a deal until you got a confirmation in writing by the person who is going to pay, and in the trade, offers were made subject to confirmation, and after a buying broker would receive authority he would get a confirmation from the seller in writing and he would have to secure a written confirmation from the buyer also; that where there is a pre-season deal or future delivery a standard confirmation of sale is always required, according to Crane's experience. That in selling oranges, cherries or grapes for futures, it was the custom of the trade to get a confirmation of sale signed by the parties on both ends who were actually paying the money or delivering the goods; that telegrams were accepted as signed confirmations; that it was the custom in the trade in situations such as existed here to secure a written confirmation of sale from the principals who were the buyers and Crane never received that. [Tr. pp. 213-218.]

Under Crane's evidence and the exhibits offered in support thereof the Court was justified in finding that the dealings between Crane and Margules called for a written confirmation of the sale by both parties.

Answer to Contentions That Neither Kazanjian nor Margules Accepted the Counter-Proposals.

Under Sections VIII and IX of appellants' opening brief they contend that there is no evidence to support the conclusions that Kazanjian never accepted the terms proposed by Margules, and that Margules never accepted the terms proposed by Kazanjian. These contentions referring to dealings between Kazanjian and the complainants are matters which should be properly answered by counsel for Kazanjian.

Counsel for Crane hereby adopts such argument as may be presented by counsel for Kazanjian in his brief in reply to said contentions.

Answer to Contentions That the Statute of Frauds Is Inapplicable.

Under Sections X and XI of appellants' opening brief appellants contend that the Statute of Frauds of California is inapplicable to a proceeding brought under the Perishable Agricultural Commodities Act, and that the California Statute of Frauds only requires the written agreement to be signed by the party to be charged.

We feel that these contentions apply primarily to the defense of Kazanjian and in view of the position of Crane to the effect that he was a buying broker for complainants and as such would not be liable for the default of Kazanjian or would not be liable for the default of Kazanjian even though he was the agent for Kazanjian, in view of the fact that the name of the seller was disclosed, we feel that these contentions should properly be argued by counsel for Kazanjian, and any argument presented by such counsel is hereby adopted as an answer on behalf of respondent Crane.

Answer to Contention That the District Court Erred in Finding That Crane Made No False Representations.

Under Section XII, page 47 of Appellants' Opening Brief, they contend that the District Court's finding that Crane made no false representations is irreconcilable with its conclusion that Kazanjian had not confirmed the sale.

In finding X the District Court found "that the statements and representations made by the said Raymond M. Crane, * * * to the said J. Margules and the Southwest Brokerage Company were not false or fraudulent, and were not made with any intention to defraud said Southwest Brokerage Company or the said Jay Margules or the West Texas Produce Company or the Central Fruit & Vegetable Co." [Tr. p. 81.]

Appellant's objection to this finding is that in finding No. IV, the Court finds that on October 2, 1944, Crane sent a night letter to the Southwest Brokerage Company stating: "Secured RedLyon Packing Company Confirmation Ten Cars Grapes as Outlined * * *" [Tr. p. 75.]

We submit that the Trial Court had before it the witnesses Crane and Kazanjian, and was in a position to determine whether or not the sending of this telegram constituted a violation of 7 U. S. C. A. Section 499(b)(4) so as to afford reparation damages under U. S. C. A. Section 499(f).

Complainants' own evidence showed an oral confirmation by Kazanjian. Complainants offered in evidence a certified copy of the proceedings before the United States Department of Agriculture, which included, among other things, the preliminary statement, findings of fact, conclusions and order of Thomas J. Flavin, Judicial Officer, date April 23, 1948. [Tr. pp. 125-126.]

One of Mr. Flavin's findings was to the effect that "On or about October 2, 1944, Red Lion orally authorized Associated to confirm the sale of 10 of the 15 carloads to complainants * * *" [Tr. pp. 49-50.]

In addition to this finding, as disclosed by complainants' own evidence, the District Court had before it the evidence of Raymond M. Crane and John C. Kazanjian.

Crane testified [Tr. p. 189] on cross-examination by Mr. Hoppenstein [Tr. p. 205], that he signed and sent the wire of October 2, 1944, to Southwest Brokerage Company, stating "secured RedLyon Packing Company confirmation ten cars grapes as outlined * * *" that he had secured from Mr. Kazanjian as the basis of sending that wire the statement that if we could meet the terms demanded he would sell these grapes under the terms that we had outlined in our telegrams from previous communications. That he, Crane, outlined to Kazanjian the terms under which he offered these grapes and had received an offer back from Southwest Brokerage. This was on the telephone and Crane thereupon went on to outline the conversation with Kazanjian. [Tr. pp. 209-210.]

The witness Crane further testified that at the time he sent the telegram of October 2nd quoting revised deal, he had discussed the terms of it with Mr. Kazanjian and that the offer was subject to confirmation and that you don't make a deal until you get a confirmation, until it is finished. [Tr. p. 213.] That in the produce business the use of the words "subject to confirmation" means confirmation in writing, by the person who is going to pay for it, that is what is finally understood and in our business, telegrams are considered writing. [Tr. pp. 214-215.] The sale subject to confirmation would require

a confirmation from the person who is going to sell the merchandise. [Tr. p. 215.] It is customary in the trade to accept telegrams as confirmation of sale except where they are required to secure a signed confirmation. And in connection with this transaction it was the custom of the trade to secure a written confirmation from the shipper Red Lion. [Tr. p. 217.] It was the custom of the trade in situations such as this, to secure a written confirmation of sale from the buyers and he never did receive it, and at the time he sent the telegram of October 2, 1944 stating "Secured RedLyon Packing Company confirmation" he did not have Red Lions' signature on a confirmation. He had their verbal agreement over the telephone. The custom of the trade is you get a deal, you call the shipper, you buy or sell whatever you are doing and if they agree to what you have done, they say yes, or no. In this particular instance I thought I secured an entire agreement as to what we proposed and what we had been proposing. A confirmation of sale and signature is a different subject. I hadn't received a written confirmation of sale but I wired Southwest Brokerage I had received confirmation of the deal because Southwest Brokerage was to get a confirmation signed by the buyer and send it to us and we would get it signed by the shipper and then send a copy back and retain a copy. [Tr. pp. 218-219.]

The witness Crane further testified that in this particular instance we fully expected to received a signed confirmation of sale which we requested from the broker. The broker normally makes it out and forwards it to us when he requests it and then we take and deliver it to the seller and get him to sign it. I think we requested that of

Southwest Brokerage in the original transaction. [Tr. p. 248.]

The foregoing testimony of witness Crane, including the complainants' own evidence shows clearly the Court was justified in finding that the statements and representations of Crane were not false and fraudulent and were not made with any intention to defraud the Southwest Brokerage Company or Margules or West Texas.

There Was No Misrepresentation or Failure to Perform a Duty Sufficient to Justify a Recovery Against Crane.

The foregoing quoted or summarized evidence and the telegrams and teletypes hereinbefore referred to and set forth in the appendix to Appellants' Opening Brief show that (1) during the ceiling on grapes Kazanjian would not employ a broker; (2) Crane, as agent for purchasers was trying to book orders for the sale of grapes; (3) Crane was to be paid a procurement charge by the buyer; (4) the offer to book grapes was subject to confirmation. [Tr. p. 451.] This meant signed confirmation by both parties.

Margules attempted to close a deal for 10 cars by a teletype message to Crane but Crane replied by teletype "Haven't been able to contact the shipper yet but sure it's okay. Will wire you definitely one way or other soon as get him." [Tr. pp. 475-476.]

By night letter on October 2, Crane wired Margules "Secured RedLyon Packing Company confirmation ten cars grapes as outlined * * *" [Tr. p. 75.]

By teletype on October 3rd Crane asked Margules "Did you sell entire ten cars Emperors" [Tr. p. 474]

and Margules replied by teletype, "What are U talking about? We ordered and you already confirmed by wire 10 cars Emperors advise." [Tr. p. 475.]

The provision of the September 26th telegram that the offer to book grapes was subject to confirmation shows clearly that Kazanjian must confirm and from Crane's evidence it meant both parties must confirm and the confirmation must be in writing and signed by seller and buyer. This is borne out by Crane's telegram to Kazanjian on October 3rd (referring to October 2 telephone conversation, between Crane and Kazanjian, where Kazanjian orally confirmed ten cars) wherein he stated "will forward confirmation for your signature soons receive air mail from buyers." [Tr. p. 476.]

Clearly there was no misrepresentation to Margules by Crane. Margules should have known the customs of the trade with reference to signed confirmations by both parties where a buying broker is trying to negotiate a sale for future delivery. Margules sending a Standard Memorandum of Sale in place of a Standard Confirmation of Sale (as required by September 26 telegram) imposed no duty on Crane in view of Kazanjian's telegram to Crane on October 4th injecting new terms into the deal. Crane thereupon sent Mr. Hoover to Kazanjian's packing house to iron out the deal and when the ceiling was lifted a few days later Kazanjian claimed he was not bound to go on with the proposed deal.

The District Court was justified in holding that there was no misleading statement made for a fraudulent purpose, which would be necessary under 7 U. S. C. A. Sections 499(b)(4) and 499(f).

Complainants Are Not Entitled to Recover on the Grounds of Fraud, as It Was Not at Issue Before the Department or the District Court.

Under Point XII appellants object to the finding that Crane made no false representations, and then contend that there were false representations and that under the Perishable Agricultural Commodities Act complainants were entitled to damages against Crane for fraudulent statements.

It will be remembered that the complaint in this action was one wherein complainants alleged that on October 3, 1944, in the course of interstate commerce respondents, by a contract in writing, contracted to sell to complainants ten carloads of grapes [Tr. p. 17, par. 4]; that Margules acted for both complainants and respondents and Associated acted for and on behalf of itself and as agent for Red Lion. [Tr. p. 19, par. 5.]

Nowhere in the complaint before the Department, or in any amended complaint, did complainants seek to recover against Crane on the theory of fraud and misrepresentation.

One of the fundamental rules of an action to recover for fraud or misrepresentation is that a fraud must be alleged. The rule in this regard is set worth in 12 Cal. Jur. p. 800, Section 62, as follows:

> "Fraud is never presumed. Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are

made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present real issues. This is the rule whether the fraud relied on is actual or constructive. It is not, therefore, sufficient to alleged fraud in general terms; such allegations are merely of conclusions which the pleader is not permitted to draw and which present no issuable facts."

In the case of *Vandervort v. Farmers and Merchants National Bank, etc.,* 7 Cal. 2d 28-30; 59 P. 2d 1028; the Court stated the rule as follows:

"Whenever fraud constitutes an element of a cause of action the facts must be alleged. (12 Cal. Jur. 800.) There must be an allegation among others that the false representations were made with intent to deceive the plaintiff or with intent to induce her to enter into the transaction. (12 Cal. Jur. 808, Sec. 65, and cases cited.) There is no allegation in the complaint either of intent upon the part of the defendant to deceive the plaintiff or of an intent to induce plaintiff to act in the matter, and there are no allegations of facts and circumstances from which such intent must necessarily be implied. Indeed, there are no allegations of false representations made by the bank. There are allegations that the plaintiff did not know certain facts connected with the transaction and that the bank did know said facts and failed to inform the plaintiff, but there is no allegation that the bank knew that plaintiff did not know, and there is no allegation directly or indirectly that it was the duty of the bank to inform the plaintiff

of matters contained in her own agreements of which she and her confidential agent presumptively had full knowledge."

In the case of *Carpenter v. Smallpage,* 220 Cal. 129; 29 Pac. 2d 841; the Court considered an action to quiet title and in the course of the trial the plaintiff offered evidence in support of the claim of fraud in procuring a deed of trust under which the defendants claimed. The Trial Court refused to admit the evidence and on appeal, in affirming the judgment the Supreme Court stated:

> "The ruling of the court was correct, as plaintiff failed to charge fraud in his complaint or in any of his pleadings." (Citing cases.)

Crane Would Not Be Liable for the Failure of Kazanjian to Ship.

As heretofore pointed out, Crane's contention before the Department was that he was the agent of the buyer and as such would not be liable for the failure of the seller to ship.

Crane never owned or possessed the 18 cars of grapes, the title and possession thereof being in Kazanjian.

Assuming that there was a binding contract on the part of Kazanjian to ship, Crane could not force Kazanjian to go through with the contract.

It seems unnecessary to present authorities in support of the contention that Crane being the agent of the buyer would not be liable for the default of the seller.

Assuming, but Not Conceding, Crane to Be the Agent of Kazanjian, He Still Would Not Be Liable for Kazanjian's Default.

This contention is urged wholly upon the assumption, without conceding the same to be correct, that Crane was the agent of Kazanjian. Still Crane would not be liable for Kazanjian's default because he had disclosed to the complainants the fact that he was acting as an agent or broker and the name of the principal for whom he was acting.

Crane's telegram to Southwest Brokerage Company under date of October 2nd disclosed Red Lion Packing Company as the shipper of the grapes.

Joe Mosesman, one of the complainants, testified as follows:

> "I knew Crane was trying to get some grapes for me and on the morning of October 3rd I knew that Crane was trying to get ten cars of Emperor grapes for me from Red Lion Packing Company and it was satisfactory to me for him to try and get the grapes for me." [Tr. pp. 395-6.]

The rule regarding non-liability of the broker is set forth in 8 Am. Jur., 1059, Section 129, as follows:

> "In accordance with the general rule of the law of agency, so long as a broker discloses his principal, or the party with whom he is dealing knows that he is acting for an undisclosed principal, he cannot be held personally liable upon a contract he negotiates on the latter's behalf, unless he employs terms which in legal effect charge himself, or personally guarantees or warrants a matter."

In the case of *Walker v. Cross* (C. C. A. 8th Circuit) 160 Fed. 372, Cross sued Walker Bros. to recover damages for the alleged breach of a contract for the sale of real estate. Walker Bros. were real estate brokers having their place or business at Macon, Missouri, and handled the matter of the sale to one Cross for a non-resident owner of certain real property in the State of Missouri. After some negotiations an agreement for the sale of real property was prepared in which Walker Bros. was named as the seller. The agreement was never signed by either of the parties. The negotiations proceeded between the parties and Walker Bros., at all times disclosed that they were not the owners of the property but were merely acting as agents for the seller. The transaction was finally consummated and Walker Bros. received their commission of $320.00 and one Nailen, the purported owner of the property, received the balance of the purchase price after paying liens and expenses of sale. It later developed that Nailen did not own the property and Cross sued Walker Bros. for damages for failure of title. The Court held that Walker Bros., as agents for the seller, were not liable for loss on the theory that the seller's agent is not liable for a default on the part of the seller.

In the case of *Mallory Steamship Co. v. Garfield* (C. C. A. 2d Circuit), 10 Fed. (2d) 664, the original plaintiff in the action sought to recover damages for delay in transportation of cotton from Texas to Rhode Island. The Mallory Steamship Co. was acting as agent for the United States Shipping Board Emergency Fleet Corp. The original plaintiff in the action was aware of the relationship between the Fleet Corp. and Mallory, for he pleaded the relationship of that agency in the complaint.

In holding that the Mallory Steamship Co. was not liable, the Court stated:

> "An authorized agent is not liable for breach of a contract which it makes on behalf of the principal except where the agency is concealed, or where it is contracting as ostensible principal. (Citing cases.)
> * * *
>
> "The record shows that the plaintiff in error did in fact both actually and ostensibly act as agent, and not as principal. Since it acted within the scope of its apparent authority in entering into a contract of carriage, the contract is that of the principal, the Fleet Corporation. All the rights and obligations which arise under it are those of the Fleet Corporation, and the agent cannot enforce the contract, neither is he bound by it."

In the case of *Marks v. Rucker & Co.*, 53 Cal. App. 568, 200 P. 655, plaintiff sought to recover a deposit made on account of the purchase price of an apartment house. The defendant acted as agent for the seller and the fact of agency as well as the owner's name was disclosed. In denying recovery of the deposit from the agent the Court stated:

> "It therefore appears that plaintiff's assignors were informed by the agent of the names of its principals. But even though we were to assume that the names of the principals were not actually disclosed to the purchasers by the agent, nevertheless it is apparent from the record that the identity of such principals was known to the purchasers from Mrs. Merrill's previous visit to the owner of the apartment house, and that they contracted with the defendant merely as an agent.

"To relieve the agent of liability, it is sufficient that the other contracting party have actual knowledge of the identity of the principal; it is immaterial how such knowledge was acquired. * * *

"Under such circumstances, it is apparent that the remedy is against the principal and not against the agent."

The same rule is laid down in the following cases:

Hurricane Milling Co. v. Steel & Payne Co. (W. Va.), 99 S. E. 490; 6 A. L. R. 637;
Drake v. Pope, 78 Ark. 327; 95 S. W. 774;
Hoon v. Hyman, 87 W. Va. 659; 105 S. E. 925;
King v. Russell, 278 Mich. 529; 270 N. W. 775.

Conclusion.

In conclusion we submit that the findings of the Trial Court are supported by substantial evidence; that Crane was a buying broker and agent for the buyers and as such would not be liable for the default of the seller.

The judgment of the Trial Court should be affirmed.

Respectfully submitted,

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